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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

May It Please the Court:

Petitioner, the City of Niles, Ohio, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the state of Ohio which was entered in the above entitled cases (Ohio Supreme Court Cases Nos. 33690 and 33691) on the twenty-first day of April, 1954. Said cases were consolidated for hearing and will be treated together in this petition.

OPINIONS IN LOWER COURTS.

The opinion of the Ohio Supreme Court is reported in 161 Ohio State 259 and is shown in the record at pages 57-66; opinion of the Court of Appeals of the Seventh District of Ohio is shown in the record, pages 48, 49. The opinion of the Mahoning Valley Sanitary District Special Court of Common Pleas, which is a special statutory court having jurisdiction in this cause, is appended hereto as Appendix C (pp. 24-42).

JURISDICTION.

The Supreme Court of the state of Ohio entered judgment on the within cases on the thirty-first day of March, 1954. The City of Niles, petitioner herein, applied for rehearing by said court in compliance with the rules of said court, which said application was denied by the Supreme Court of Ohio on the twenty-first day of April, 1954. No opinion accompanied said denial.

QUESTIONS PRESENTED.

1. Whether the denial of petitioner's appeal from the special court of jurisdiction to the Court of Appeals and from the Court of Appeals' judgment to the Supreme Court of Ohio deprives the petitioner of equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Whether said equal protection is violated when the Ohio Supreme Court construes the Ohio Sanitary District Act so that there is a denial of appeal to the petitioner from a final judgment of the trial court overruling the petitioner's exceptions and objections to sanitary district assessment against its property, while, at the same time, said Ohio Supreme Court allows the sanitary district the right of appeal from said judgment.

2. Whether levying by special assessment the total cost of a public improvement against real property within two cities deprives the petitioner, the representative of property owners in the City of Niles, which is thus assessed, of its property without just compensation, and whether such levy constitutes a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, when it is admitted that properties outside of said cities will benefit from said improvement but have not been assessed therefor.

3. Whether the taxation of real property within a city based upon the consumption of water by said city, which produces twice as much taxation against the individual property of that city as compared with a similar property in the second city of the taxing district, and a refusal of right of appeal to said city, but the granting of said right to its adverse party, the sanitary district, constitutes a taking of the real property within said city without just

compensation and constitutes a denial of the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED.

The within petition involves the construction and interpretation of the Fourteenth Amendment to the United States Constitution, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes of the Revised Code of the state of Ohio that will be treated in this petition are Sections 6115.35, 6115.36, 6115.37, 6115.41, 6115.44, and 6115.48. The provisions of these sections are fully set forth in the Appendix at pages 17-24. Inasmuch as the General Code of Ohio was revised on October 1, 1953, the pleadings and opinions in the lower courts will refer to different code numbers. However, the Appendix shows a cross reference between all General Code and Revised Code sections.

STATEMENT OF MATTER INVOLVED.

The petitioner is a municipal corporation located in Trumbull county, Ohio, having a population of approximately 17,000 people and a real property tax valuation of approximately $37,000,000.00. The petitioner, together with

the city of Youngstown which has a population of approximately 170,000 people and a real property tax valuation of approximately $370,000,000.00 and which is located in Mahoning county, Ohio, form component parts of the Mahoning Valley Sanitary District, which is a political subdivision in itself formed under the statutes of the Ohio Sanitary District Act (Ohio Revised Code Sections 6115.01 et seq.). This sanitary district consists of lands lying within the cities of Youngstown and Niles and supplies water both to these cities and to areas located both outside of these cities and outside of the district (see Appendix pp. 14-16). The present litigation arises out of a plan by said district to enlarge its facilities so as to increase its daily output both to the consumers and taxpayers within the cities and the areas located outside said cities. The enlarged facilities would not be needed if service to these outside areas were discontinued.

By virtue of the provisions of the Ohio Sanitary District Act, the cost of the proposed improvement must be assessed by levy against the real estate both within and without the district and cities which form it, the only basis for said levies being that these properties benefit from said facilities. An appraisal of benefits was prepared; was heard by the special district court of jurisdiction, on which sit a Trumbull county judge and a Mahoning county judge. The law provides that exceptions and objections may be filed by any property owner, and this petitioner, together with other parties, did file said objections before said sanitary district court (Record, pp. 10-17). The petitioner, at the commencement of proceedings in the lower court of jurisdiction was served with summons, said service applying to the petitioner not only as a municipal corporation, but also on behalf of all the taxpayers within the corporate

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limits of the petitioner. As such, said petitioner was an adverse party to the proceedings entitled "In the Matter of the Mahoning Valley Sanitary District." As such, the petitioner filed pleadings at each stage of the proceedings, objecting and excepting to the procedure and method of determining the benefits and levying of the assessment of costs for the improvement. It is in this dual capacity, both as a municipal corporation and as a taxpayer on behalf of all other taxpayers within said municipal corporation, that this petitioner addresses its appeal to the United States Supreme Court.

This petitioner objected to the procedure followed at each step in the litigation and raised the federal question of the constitutionality of the action of the appraisers, lower court, Court of Appeals, and the Supreme Court of Ohio as to the method of assessment, as to the denial of due process of law, and as to the denial of equal protection of the laws. The first said objection was raised in the motion for new trial filed by this petitioner, which said motion was denied by the trial court (Record, p. 39). In support of said motion, by way of brief, this petitioner discussed the constitutional questions raised herein, to wit, the denial of due process of law and equal protection of the laws.

On appeal to the Seventh District Court of Appeals, this petitioner assigned the above discussed federal questions as error. The Court of Appeals heard the appeal on the merits, but dismissed petitioner's appeal on the ground that petitioner had no right of appeal from the decision of the trial court (Record, pp. 41-43).

An appeal as of right was filed by this petitioner before the Ohio Supreme Court, one of the bases of said appeal being that the petitioner was denied due process of law

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under the Fourteenth Amendment to the Constitution of the United States because of the taking of petitioner's property without just compensation, and also that the property owners in the City of Niles had been denied the equal protection of the laws. The assignments of error of the petitioner specifically included the raising of these federal questions (Record, p. 46). In addition, a motion was addressed to the Ohio Supreme Court requesting a certification to it of the record of the Seventh District Court of Appeals. Said motion was allowed, but, on final hearing, the Supreme Court not only dismissed the petitioner's appeal as of right on the basis that no debatable constitutional question existed, but also ruled that this petitioner had no right of appeal from any of the lower courts' decisions (Record, p. 71). At the same time, the Ohio Supreme Court ruled that the directors of the sanitary district had a right of appeal. This question had not been raised anywhere in the lower courts.

In further objecting to the Supreme Court's granting of a unilateral appeal in favor of the district but denying said right of appeal to this petitioner, and because said action of the Supreme Court violated the Fourteenth Amendment to the Constitution of the United States, this petitioner applied for rehearing before the Ohio Supreme Court. Said application for rehearing was denied (Record, p. 72).

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REASONS FOR GRANTING THE WRIT AND BRIEF.

A. Unilateral Appeal.

The petitioner respectfully submits that it and the property owners of the City of Niles, Ohio, have been denied due process of law and equal protection of the laws as guaranteed by the United States Constitution. The Ohio Supreme Court, by its decision and opinion (Record, pp. 57-66), has in fact, ruled that the board of directors of the Mahoning Valley Sanitary District, the party adverse to the petitioner in this appeal, which is the public authority itself, has the right to appeal from the decision of lower courts, but that the City of Niles, a member city and property owner of said public authority, has no such right to appeal. Throughout the objections, motions, assignments of error, and other pleadings filed in the lower courts by the petitioner, as are set forth in the appendix, this petitioner asserted its right to have the appellate courts of the state of Ohio review the decision of the trial court. The Ohio courts ruled that the statutes of Ohio made the trial court's decision "final and incontestable."

The Ohio Supreme Court has ruled in this case that the Ohio Sanitary District Act provides the right of appeal to the officials of the sanitary district, but that the member cities and property owners thereof may not obtain a review of the trial court's decision, despite the fact that exceptions and objections were raised by said cities and property owners. This ruling, in effect, permits the agency that levies the taxes and assessments to appeal from its own decision setting forth said levy and taxes, but amazingly denies the taxpayer who is assessed the right of appeal from said decision.

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By reason of the action of the Ohio appellate courts, the petitioner has been denied due process of law and equal protection of the laws, which is contrary to the principle of law established by this court in the case of **Missouri v. Lewis**, 101 U. S. 20; 25 Law Ed. 989, (1879), where, at page 30 and page 992 respectively, the United States Supreme Court held:

> "It is the right of every state to establish such courts as it sees fit and to prescribe their several jurisdictions as to territorial extent, subject matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of the citizens of the United States; and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last construction, as to equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject matter, amount or finality of decision, **if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases, and under like circumstances, to resort to them for redress.**" (Emphasis supplied.)

Another fundamental principle of law, as established by this court, was violated by the appellate court's interpretation of the Ohio statutes, to wit, the law must be equally applied and all men must stand equal before the law. This principle was established by the case of **Truax v. Corrigan**, 257 U. S. 312; 66 Law Ed. 254 (1921). Certainly, the necessary equality has not been achieved in this case when the public authority, which levies the assessment, has been given the right of appeal to the higher courts for errors, but the member municipalities and private citizens are ordered to accept as final the decision of the lower court

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without right of appeal. If the statutes of the Sanitary District Act of Ohio grant the sanitary district board of directors preferential treatment in appellate procedure over the member cities and taxpayers within said district, then, it is submitted, said acts deny said property owners and taxpayers and residents of the municipalities due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment. The trial court of jurisdiction and the directors are both creatures of the Sanitary District Act and both supervise the operation of said district; the directors are appointed by the trial court as are the appraisers who computed the levy of assessments contested herein. Equal protection of the laws demand that this petitioner have a right of appeal from the judgment of the court of jurisdiction if for the sole reason that said petitioner should have its case determined by an entirely independent and unbiased court. See **Ohio Valley Water Company v. Ben Avon Borough**, 253 U. S. 287; 64 Law Ed. 908 (1920).

B. Unequal Taxation and Discriminatory Assessment.

The **second** question presented to this court for review involves the right of the sanitary district, a public authority, to levy special assessments for the total cost of a public improvement against only part of the lands and properties which will benefit therefrom. The cost of the project is estimated at $6,000,000.00. It is admitted that said project is to provide a water supply for property owners within the corporate limits of the cities of Niles and Youngstown and for the benefit of lands valued at more than $50,000,000.00 lying outside the boundaries of said cities. These outside areas, though admittedly benefiting

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from said improvement, will not be assessed therefor and, unless this court grants the petition of this petitioner, the City of Niles, said petitioner will be unjustly taxed for the benefit of these outside areas. This certainly is unequal and unfair taxation.

Furthermore, this method of taxation is unconstitutional and unfair for the reason that the Ohio Sanitary District Act requires that these outside areas be assessed. In spite of all this, each and every court of the state of Ohio involved in this litigation have refused to comply with the statutes and Constitution of the state of Ohio and has, either directly or indirectly by refusing the right of appeal to petitioner, sanctioned the levying of assessments against only part of the area benefiting from the public improvement.

This court has held in a number of cases that the undervaluing of a property constitutes a denial of equal protection of the laws to a property owner whose lands have been fully valued. This court has so held specifically in the cases of **Sunday Lake Iron Company v. Wakefield**, 247 U. S. 350; 62 Law Ed. 1154 (1918); and **Sioux City Bridge Company v. Dakota County**, 260 U. S. 441; 67 Law Ed. 340 (1923).

The Ohio statutes require that all areas benefiting from a public improvement must be assessed, and to assess the entire cost of said improvement against only a portion of said area is a violation of the due process clause of the Fourteenth Amendment. To exact from the owner of private property the cost of a public improvement in excess of the special benefits accruing to said owner is a taking under the guise of taxation of said private property for public use without compensation. The private property of the taxpayers of the City of Niles, Ohio, the petitioner

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herein, has been atken in this case without due process of law and in direct violation of the rule established by this court in **Norwood v. Baker**, 172 U. S. 269; 43 Law Ed. 443 (1898). Having property to be assessed for a public improvement, said property must specially benefit therefrom as distinguished from other properties who do not benefit therefrom. If an assessment is in excess of the benefits, or if the assessment is against property which does not benefit, or if the entire assessment is made against only part of the benefiting property, the Fourteenth Amendment to the United States Constitution is violated.

C. Unconstitutional Tax Distribution Between Member Cities.

The **third** federal question asserted by this petitioner concerns what the petitioner believes is an unconstitutional division of assessments between the cities of Niles, the petitioner herein, and the city of Youngstown. The taxpayers of the City of Niles, per $1,000.00 valuation, have been assessed two and one-half (2½) times as much as the taxpayers of Youngstown.

The Ohio Sanitary District Act provides that the cost of the public improvement shall be paid by assessing benefiting real estate within and without the sanitary district. The Fourteenth Amendment to the United States Constitution demands that said assessment must be equal and must not be made in such a manner as to deny a property owner due process of law. The appraisers, directors, and lower court of jurisdiction base the rule of taxation against the properties in Youngstown and Niles majorly on the water consumption had in both cities. As a result, the taxpayers of Niles have been assessed 17% and the taxpayers of

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Youngstown 83% of the cost of said improvement. Of the total real estate within the sanitary district, 92½% lies within the city of Youngstown and 7½% within the City of Niles. Simple computation of arithmetic will show that the individual taxpayers of Niles, the petitioner herein, have been assessed 2½ times as much as the individual taxpayers of Youngstown.

The above discussion conclusively shows that the lands and improvements thereon within the sanitary district have not been taxed by uniform rule according to value. The assessed property is taxed according to its value, but the tax is based upon another factor which is in no way related to the value of the property, to wit, water consumption. This certainly violates the Fourteenth Amendment to the Constitution of the United States.

In addition, the failure to assess outside areas, which is hereinabove discussed, increases the assessment made against the petitioner's property. It is fundamental that property may not be assessed or taken without just compensation and that the assessment must be related to the value thereof. The appellate courts of the state of Ohio, in refusing to hear the appeal of the petitioner, have denied this petitioner equal protection of the laws and due process of law and have sanctioned, therefore, the taking of property of the petitioner without just compensation and without due process of law.

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CONCLUSION.

The constitutional issues in this case are important issues. The petitioner, a municipal corporation and property owner, and a member city of the Mahoning Valley Sanitary District, has been denied the right of appeal in a case wherein it is to be assessed over $1,000,000.00 for the cost of a public improvement. The Ohio courts have granted the assessing authority itself the unilateral right to appeal. In other words, the Ohio courts have held in this case that the taxing authority may appeal from its own decision, but the municipal corporation and private taxpayers who are to be assessed for said improvement may not appeal from said decision.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

EXHIBITS.

(The following exhibits were made a part of the record in the hearing on exceptions held January 21, 1952, before the Common Pleas Court.)

Ohio Water Service Company Exhibit A.

Mahoning Valley Sanitary District

1952 Daily Average of Sanitary District Water supplied to member cities and to the Village of McDonald

Youngstown	22,752,361	gal. per day
Niles	5,044,820	gal. per day
McDonald	796,000	gal. per day
*Total Output	28,593,181	gal. per day

Note *—It should be noted 1952 output was affected by the steel strike.

Average use of Sanitary District Water Outside the District in Gallons per Day during 1952

Youngstown			
Industrial		903,234	
Domestic & Fire Protection	(a)	959,805	1,863,039 GPD
Niles			
Industrial	(b)	1,664,732	
Domestic & Fire Protection	(c)	72,600	1,737,332 GPD
McDonald			
Industrial			
Domestic & Fire Protection			796,000 GPD
Total Outside Boundaries of the District			4,396,371 GPD

Note (a) Consumption for 1952 based on 10% increase over 1950 actual; as this is the growth area with large amount new construction.

Note (b) Niles industrial consumption is based on allocating Republic Steel Plant as 50% inside and 50% outside.

Note (c) Niles domestic and fire protection use outside based on 550 consumers @ 120 GPD.

1952 Industrial Use of M.V.S.D. water based on analysis of last four quarterly billings, but excluding McDonald

Youngstown

Inside Corporation			
Billings	7,358,125		
10% Line Loss & Meter Slippage	735,813	8,093,938	
Outside Corporation			
Billings	821,122		
10% Line Loss & Meter Slippage	82,112	903,234	8,997,172 GPD

Niles

Inside Corporation			
Billings	1,875,133		
10% Line Loss & Meter Slippage	187,513 (a)	2,062,646	
Outside Corporation			
Billings	1,513,393		
10% Line Loss & Meter Slip- Industry ...	151,339 (a)	1,664,732	3,727,378 GPD
Total Sanitary District Water going to Industry			12,724,550 GPD
Percentage Used by Industry			44.62%

Ohio Water Service Company Exhibit B.

1952 Tax Valuation of Areas Served by Mahoning Valley Sanitary District

	Amount	Tax Valuation	Percent
Youngstown Area Served			
Inside Sanitary District	361,448,430		
Outside Sanitary	66,127,550	427,575,980	88.74%
Niles Area			
Inside Sanitary District	36,308,730		
Outside Sanitary District	4,295,550	40,604,280	8.43%
McDonald		13,650,000	2.83%
Total Area Served		481,830,260	100.00%

Note: All of the foregoing matter has been certified as part of the record in this cause by the clerk of the Supreme Court of Ohio.

APPENDIX B.

CONSTITUTION OF THE STATE OF OHIO.

Article IV, Sec. 2, 11 Page's Ohio General Code Annotated, 1952 Supp. 24. **"The supreme court.** * * * It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. * * *"

(Other portions of this section of the constitution are not pertinent to this cause and are, therefore, omitted.)

STATUTES OF THE STATE OF OHIO.

Ohio General Code, Section 6602-41, 5 Page's Ohio General Code Annotated 77 (Ohio Revised Code, Section 6115.10.) **Appointment of director; qualifications; vacancy.** Within thirty days after entering the decree incorporating said district, providing said district is wholly within one county, the court shall appoint one person who shall be a resident freeholder within the district as a director of the district for a term of five years from the date of his appointment. Provided further that in case said district is composed of more than one county, or part thereof, then each county shall be entitled to one director who shall be a resident freeholder of such county. In no event shall there be more than one director for each county. The court shall fill all vacancies which may occur in the office of director or directors.

Ohio General Code, Section 6602-58, 5 Page's Ohio General Code Annotated 82 (Ohio Revised Code, Section 6115.29). **Appointment of appraisers; qualifications, powers and duties.** At the time of making its order organizing the district or at any suitable time thereafter, either in term or in vacation, the court or judge shall appoint three appraisers, who shall in every case where appraisers are appointed under this act [G. C. §§6602-34 to 6602-106] be recommended by the board of directors, and whose duty it shall be to appraise the lands or other property within and without the district to be acquired for rights of way, reservoirs and other works of the district, and to appraise all benefits and damages accruing to all lands within or without the district by reason of the execution of the official plan. Said appraisers shall be freeholders residing within the State of Ohio, who may or may not own lands within said district. Provided further that no two of said appraisers shall be residents of the same county. Each of the appraisers shall, before taking up his duties, take and subscribe to an oath that he will faithfully and impartially discharge his duties as such appraiser, and that he will make a true report of such work done by him. The said appraisers shall at their first meeting elect one of their own number chairman, and the secretary of the board of directors or his deputy shall be ex officio secretary of said board of appraisers during their continuance in office. A majority of the appraisers shall constitute a quorum, and a concurrence of the majority in any matter within their duties shall be sufficient for its determination. Said appraisers shall continue to hold their offices until excused by the court, and the court shall fill all vacancies in the board of appraisers, or may appoint a new board for subsequent appraisals, as occasion may require. Such new

board, if appointed, shall fill all the requirements of the board of appraisers of the district, and perform its duties.

Ohio General Code, Section 6602-60, 5 Page's Ohio General Code Annotated 83 (Ohio Revised Code, Section 6115.31). **Appraisement of benefits and damages to lands outside district. Land affected outside district.** If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in the district, they shall appraise the benefits and damages to such land, and shall file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district.

Ohio General Code, Section 6602-64, 5 Page's Ohio General Code Annotated 84 (Ohio Revised Code, Section 6115.35). **Hearing on appraisals; filing exceptions.** Any property owner may accept the appraisals in his favor of benefits and of damages and of lands to be taken made by the appraisers, or may acquiesce in their failure to appraise damages in his favor, and shall be construed to have done so unless he shall within ten days after the last publication provided for in the preceding section file exceptions to said report or to any appraisal of either benefits or damages or of land to be taken which may be appropriated. All exceptions shall be heard by the court beginning not less than twenty nor more than thirty days after the last publication provided for herein, and determined in advance of other business so as to carry out, liberally, the purposes and needs of the district. The court may, if it deem necessary, return the report to the board of appraisers for their further con-

sideration and amendment, and enter its order to that effect. If, however, the appraisal roll as a whole is referred back to the appraisers, the court shall not resume the hearing thereof without new notice, as for an original hearing thereon. But the court may, without losing jurisdiction over the roll, order the appraisers to recast the roll when the order of the court specifies the precise character of the changes thereof.

Ohio General Code, Section 6602-65, 5 Page's Ohio General Code Annotated 84 (Ohio Revised Code, Section 6115.36). **Decree on appraisals.** If it appears to the satisfaction of the court after having heard and determined all said exceptions that the estimated cost of constructing the improvement contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm said appraisers' report as so modified and amended, and such findings and appraisals shall be final and incontestable. In considering the appraisals made by the board of appraisers, the court shall take cognizance of the official plan and of the degree to which it is effective for the purposes of the district. In case the court shall find that the estimated benefits appraised are less than the total costs of the execution of the official plan, exclusive of interest on deferred payments, or that the official plan is not suited to the requirements of the district, it may at its discretion return said official plan to the directors of the district with the order for them to prepare new or amended plans, or it may disorganize the district after having provided for the payment of all expenditures.

Ohio General Code, Section 6602-69, 5 Page's Ohio General Code Annotated 85 (Ohio Revised Code, Section 6115.40). **Power to alter or add to official plan; procedure.** The board of directors may at any time, when necessary

to fulfill the objects for which the district was created, alter or add to the official plan, and when such alteration or additions are formally approved by the board, by the state department of health, and by the court, and are filed with the secretary, they shall become parts of the official plan for all purposes of this act. Where such alterations or additions in the judgment of the court neither materially modify the general character of the work, nor materially increase resulting damages for which the board is not able to make amicable settlement, nor increase the cost more than ten per cent, no action other than a resolution of the board of directors and approved by the state department of health shall be necessary for the approval of such alterations or additions. In case the proposed alterations or additions materially modify the general character of the work or materially modify the resulting damages or materially reduce the benefits, for which the board is not able to make amicable settlement, or materially increase the benefits in such a manner as to require a new appraisal, or increase the cost more than ten per cent, the court shall direct the board of appraisers (which may be the original board, or a new board appointed by the court on petition of the board of directors or otherwise), to appraise the property to be taken, benefited or damaged, by the proposed alterations or additions. Upon the completion of the report by the board of appraisers, notice shall be given and a hearing had on their report in the same manner as in the case of the original report of the board of appraisers, and the same right of appeal to a jury shall exist. Provided: That where few land owners are affected, the clerk of the court may, on order of the court, if found to be more economical and convenient, give personal notice of the pendency of the report of said appraisers, instead of notice by

publication; and Provided: That when the only question at issue is additional damages or reduction of benefits to property, due to modification or additions to the plans, the board of directors may, if they find it practicable, make settlements with the owners of the property damaged, instead of having appraisals made by the board of appraisers. In case such settlements are made, notice and hearing need not be had. After bonds have been sold, in order that their security may not be impaired, no reduction shall be made in the amount of benefits appraised against property in the district, but in lieu of such reductions of benefits, if any are made, the amount shall be paid to the party in cash. This provision shall apply to all changes in appraisals under this act [G. C. §§6602-34 to 6602-106].

Ohio General Code, Section 6602-70, 5 Page's Ohio General Code Annotated 86 (Ohio Revised Code, Section 6115.41). **Appeal shall not delay proceedings; waiver.** No appeal under this act [G. C. §§6602-34 to 6602-106] shall be permitted to interrupt or delay any action or the prosecution of any work under this act, except where the party appealing is entitled to a jury under the constitution of the state, and such jury trial has not been had; in which case, only so much of the work shall be interrupted or delayed as would constitute a taking of or a damaging of the property of the appellant. The board of directors of any district organized under the terms of this act shall have the right to appeal from any order of the court of common pleas made in any proceedings under this act, not requiring the intervention of a jury. The failure to appeal from any order of the court in any proceedings under this act within the time specified herein shall constitute a waiver of any irregularity in the proceedings, and the remedies provided for in this act shall exclude all other remedies except as herein provided.

Ohio General Code, Section 6602-77, Page's Ohio General Code Annotated 88 (Ohio Revised Code, Section 6115.48). **Assessment for bond fund; additional levies.** After the list of real property, with the appraised benefits as approved by the court, or that part thereof from which no appeal is pending, has been filed with the secretary of the district, then from time to time, as the affairs of the district demand it, the board of directors shall levy on all real property, upon which benefits have been appraised, an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of the execution of the official plan including superintendence of construction and administration, plus ten per cent of said total, to be added for contingencies, but not to exceed, in the total of principal, the appraised benefits so adjudicated.

Apportionment of assessment. The said assessment shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits appraised, and not in excess thereof, and in case bonds are issued as provided herein and hereafter, then the amount of interest, which will accrue on such bonds, as estimated by said board of directors, shall be included in and added to the said assessment, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and costs of making said improvement are or are not equal to or in excess of the benefits appraised.

(The remaining portion of §6602-77 is not pertinent to this cause and is therefore omitted.)

Ohio General Code, Section 12223-29, 9 Page's Ohio General Code Annotated 513 (Ohio Revised Code, Section 2505.29). **No appeal filed without leave of supreme court;**

exceptions. Except as to the judgment or final order of the court of appeals or a judge thereof, in cases involving questions under the constitution of the United States, or of this state, and in cases which originated in the court of appeals and except as to proceedings of administrative officers as may be provided by law, no appeal shall be filed in the supreme court, in cases over which it has jurisdiction, without its leave, or that of a judge thereof.

APPENDIX C.

OPINION AND DECISION OF COMMON PLEAS COURT ON HEARING ON EXCEPTIONS.

Judge Belt:

This cause came on for hearing on the report of the board of appraisers on Amendment No. 1 of the official plan of the sanitary district and the exceptions thereto filed by various interested parties. The board of appraisers report consisted of a majority report concurred in by two of the appraisers and a separate minority report by one appraiser.

At the outset, the board of appraisers found, unanimously, that the estimated cost of constructing the proposed improvement contemplated in Amendment Number 1 to the official plan was less than the benefits appraised. The court is in accord with such finding, and therefore approves and confirms the report of the board of appraisers insofar as that finding is concerned.

The report, among other things, sets out that the benefits as between the two cities of Youngstown and Niles was heretofore determined by a combination of population and tax valuation ratios, as to the original plan and in that manner an approximate ratio of 9 for Youngstown and 1

for Niles was fixed at the time of the organization of the district.

The directors of the district in this case issued a directive to the board of appraisers to review the original appraisal of benefits as between the member cities, taking into consideration the actual cost of various portions of the official plan, changes in population, changes in tax valuation, and any and all other pertinent matters which should be considered.

In considering this directive, the board took into consideration the report of the prior board of appraisers, made February 8, 1928, the reports of various engineers, the activities of the district, the member cities populations, tax valuations and the funds paid by each city in past years, as well as many other phases.

After taking all of these matters into consideration, it was recommended by the appraisers that the board of directors adopt such procedure as shall, in effect, relieve the city of Youngstown from the payment of $120,638.97 now standing delinquent from the 1932 levy against the city and that otherwise the remaining levies stand as originally determined.

The majority report of the board of appraisers made the following allocations of cost for the new improvement contemplated by the amendment as between the cities of Youngstown and Niles, to wit:

City	From Tax Duplicate 10% of Total	From Consumption 90% of Total	Total Benefit Percentage
Youngstown	91.9%=9.19%	76.2%=68.58%	77.77
Niles	8.1%= .81%	23.8%=21.42%	22.23

Youngstown, from the tax duplicate 91.9% equalling 9.19%; from consumption, 90% of the total, 76.2% equal-

ling 68.58%, making a total benefit percentage against Youngstown of 77.77%.

Niles, from the tax duplicate, 10.% of total, 8.1% equaling .81%; from consumption, 90.% of total, 23.8% equalling 21.42%, making a total benefit percentage of 22.23%.

The city of Youngstown excepted to this report specifically as follows:

1. Requests and suggests benefits be apportioned 100% on water consumption.

2. That the apportionment be made each calendar year on the average consumption for the preceding three-year period.

3. Excepts to the failure of the board of appraisers to allow a readjustment of the apportionment of benefits and assessments for the years 1951, 1952 and 1953 on the basis of water consumption.

4. Excepts to the failure of the board of appraisers to allow adjustment of benefits for the three years preceding 1951 on the basis of consumption.

Praying that the board of appraisers recommend to the court that an adjustment be made of the delinquency of $120,638.97 from the 1932 levy.

The city of Niles in its exceptions urge that the factor of water consumption has no place in the determination of benefits and assessments:

1. That the general benefits, reflected in public comfort, convenience, welfare and fire protection can be determined only in accordance with the ratio of the tax valuation of the member cities, further pointing out that the real estate taxpayer of Niles receives but 10% of the benefit but must pay 22.23% of the charges and that the tax valuations be retained as the only factor in allocating cost.

2. That by giving but a 10% weight to the tax valuations of the properties is contrary to the Constitution of the state

of Ohio, Article 12, Section 2, which provides that "land and improvements thereon shall be taxed by uniform rule according to value."

3. That the surplus fund be credited to the member cities in the exact proportion in which it was paid to the district.

4. That the city of McDonald and all other property outside the city limits of Youngstown and Niles be assessed.

Observation is further made of the following language:

> "We appreciate the difficulty of extending the district and the added cost of administration concurrent with the same."

The court appreciates particularly this paragraph contained in the exceptions.

The Ohio Water Service Company charge that the village of Canfield, lands in Boardman sewer district No. 1, lands in Austintown township sewer district No. 5, lands in Canfield-Austintown sewer district No. 15, Cornersburg sewer district No. 14, West Austintown sewer district No. 13, Lanterman sewer district No. 7 in Mahoning county; the village of McDonald, northwesterly section, southerly section and eastern section of Weathersfield township, lands in Liberty sewer district No. 1 and also the city of Girard be included in the district to be assessed.

Other exceptions are filed by various individual property owners in the district.

Section 2 of Article 12 of the Constitution provides that "land and improvements shall be taxed by a uniform rule according to value," and counsel suggests that the action of the board of appraisers was violative of this section.

The court has examined and considered that proposition, and the unanimous conclusion of the court is that it lacks substance. Illustrative of the claim would be the following situation, if the appraised values were used: Assume that

certain property in Youngstown has an appraised value of $20,000.00 and like property, in all respects, in Niles has an appraised value of $10,000.00, both using equal quantities of water. Using the rule of uniformity as claimed, the property owner in Youngstown would pay twice as much or more than the property owner in Niles for exactly the same service. The assessed value for taxation purposes would violate rather than conform to the claimed rule of uniformity. Under this rule, if applicable at all to the situation presented in this case, equal charges for water consumption would more nearly conform to the rule, which proposition is vigorously opposed by the city of Niles. We again say there is nothing of substance in this exception. Water is a commodity, as gas and electricity are commodities, paid for on the basis of quantity used.

From the report of the appraisers and the exceptions thereto, the court conceives the following to be the issues for the court's determination.

1. How should the delinquent account owing by the city of Youngstown be treated.

2. Should there be a change of the proportional levy to pay the original bond issue.

3. Should there be an adjustment of the remaining tax levies between the cities.

4. What should be done with the surplus funds.

5. Should any or all of the territory outside of the boundaries of the original district be assessed, and

6. The division of cost of the proposed bond issue.

Those subjects will be discussed in the order in which they have been stated.

Chapter 4 D of the General Code, comprising Sections 6602-34 to and including Section 6602-106, known as the Sanitary District Code, provides for the organization and

operation of sanitary districts and is designed to furnish a comprehensive plan for such organization and operation.

The sanitary district may be organized for any one of five purposes as set out in sub-section 35 of the chapter. This district was organized and is now being operated under paragraph (e) of said sub-section, that is, for the purpose of providing a water supply for domestic, municipal and public use.

Sub-section 36 provides for the organization of a district by a petition signed either by

1. 500 free-holders.
2. A majority of free-holders.
3. By the owners of more than one-half of the property in acreage; or,
4. By the owners of more than one-half the valuation of property within the district.

This district was properly and legally organized under the chapter referred to.

The first question that presents itself is how the delinquency owing by the city of Youngstown, in the sum of $120,638.97, be adjudicated. The board of appraisers seems to have had serious doubts as to this issue. At the outset, we must assume that the levy for the payment of the bonds was a regular and legal assessment. This assessment was approved by the court on or about the year 1928. This court, in the opinion of all of its members, has no jurisdiction whatever to cancel this delinquency. For authority reference is made to the case of State, ex rel. Donsante, a Taxpayer, v. Pethtel, Auditor, et al., reported in 158 O. S., 35, Ohio Bar of June 16, 1952. The court in that case was dealing with an assessment and in that connection says:

> "Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute."

For those reasons and upon the authority cited, the court holds that the delinquency cannot be forgiven by the court. Indeed to do so, under the circumstances here presented, would be unfair to the city of Niles, because the amount involved would be credited, if paid, to the surplus funds of the district, which, in turn, would be used to reduce the bonded indebtedness presently in contemplation. We, however, make this suggestion, that, if the city of Youngstown pay to the city of Niles 9.45% of this delinquency, or pay the same to the sanitary district to be credited to the city of Niles on the proposed bond issue, then and in such event we feel that the district itself may, and can legally, if the directors so determine, assign the remainder of said delinquency to the city of Youngstown. As the court understands this situation, it is extremely unlikely that the whole of the delinquency can eventually be paid, for the reason that the amount represents assessments on distress property which has been either foreclosed or forfeited to the state, in which event perhaps only such sums as may be recovered could be applied to the delinquency. If the city of Youngstown so elects to pay to the city of Niles, or to the sanitary district, for the benefit of said city the 9.45% of the delinquency, and shall pay the same on or before 90 days from the time of filing of the entry herein, then and in such case the court finds that the balance of said delinquency may be assigned by the board of directors to the city of Youngstown, and any future recoveries thereon would belong to the city of Youngstown.

Issues 2 and 3 may be considered together and as to such issues the court is of the opinion that it has no jurisdiction either to change the proportionate levy or to adjust the same insofar as the original bond issue is concerned. The same reasoning that applies to the No. 1 issue would also

apply in full force to issues 2 and 3. All such matters are res judicata.

The fourth issue is how should the surplus funds, which will be credited on the indebtedness incurred by reason of Amendment No. 1, be allocated as between the cities of Youngstown and Niles. The surplus funds of the district may be used as the board of directors may determine for any lawful purpose of the district. It is perfectly proper to apply said surplus or so much thereof as the board of directors may determine, in the exercise of their discretion, to the new project. This surplus fund is a legally created fund belonging to the district and may, in the opinion of the court, be applied to the indebtedness created by reason of the carrying out of the improvements set out in Amendment No. 1. This is a surplus fund and does not belong, in whole or in part, either to the city of Youngstown or to the city of Niles, and such fund may be used by the district for any lawful purpose or objective. 2: If the board of directors elect to apply the surplus of the district, or any part thereof, on the cost of the improvement, the bond issue would be thereby reduced by such sum or sums paid.

Number 5 issue is whether or not any territory outside of the district as now existing should be assessed for the contemplated improvement. As to that proposition, it must be kept in mind that sub-section 36 specifically provides for the organization of the district. In connection with sub-section 36, we have sub-section 60 which provides, in substance, for the appraisement of benefits and damages to lands outside the district and further provides that if the appraisers find that the lands or other property outside of the district will be affected by the improvement or should be included in the district that they shall appraise the benefits and damages to such land and file notice in court of the appraisal. Sub-section 61 provides further

that if the report of appraisers includes recommendation that other lands be included in the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in the Act for a hearing on the petition for the creation of a district. There is no further legislation or provision in the Sanitary Code on that subject. Further proceedings are not detailed by the Act, insofar as taking in additional territory is concerned, and are left solely to the imagination. The import of the language referred to is that no additional territory can be taken into the district without a compliance with Section 6602-60. The board of appraisers did not include or appraise any outside territory, which failure upon the part of the board of appraisers, raises an inference at least that no outside lands were benefited. The conclusion of the court is that it is useless to do a vain thing. The court believes that under the situation presented, it would be folly to attempt to take in outside territory. Sub-section 36 would be controlling. That is to say that a district can only be enlarged in the same manner that a district can be created under the law. This may or may not be desirable, but whether desirable or otherwise, the court, as a court, could not initiate such a project. The court further feels that the outside territory served should be taken into consideration in dealing with Issue No. 6, the last and most important issue in this case. It is claimed by at least one of the objectors that an appraisement of the outside territory should be made and then take the territory into the district, but there is a notable failure upon the part of the exceptor to furnish any legal plan by which such result can be accomplished. On every hand, as to this issue, practical difficulties would be encountered. This exception is re-

jected by the court. This court believes that it could not be done. No territory certainly can be taken into the district without the territory under consideration having something to say about it, so this exception is rejected by the court.

The sixth and last issue for the determination of the court is the division of the cost of this project between the cities of Youngstown and Niles. Sub-section 64 provides that all exceptions shall be heard by the court and that the court may, if it deem necessary, return the report to the board of appraisers for their future consideration and amendment and enter its order to that effect, but that the court may, without losing jurisdiction over the roll, order the appraisers to recast the roll when the order of the court specifies the precise character of the changes thereof. In the consideration of the report of the appraisers, the court feels that perhaps the majority of the board of appraisers felt that the city of Youngstown, under the original allocation of cost, had assumed more than its share of the burden and that therefore the city of Niles should be compelled to pay something more than its share of the cost of the improvement under Amendment No. 1. This, of course, is mere speculation upon the part of the court but the court does feel that the proposed allocation of cost between the two cities is somewhat arbitrary and that the appraisers should be ordered to recast the roll under a specific formula as directed by the court. In reaching this conclusion, the court has considered the quantity of water sold by the city of Niles to corporations and individuals outside of its corporate boundaries. The court desires to commend the city of Niles for its activities in that respect. In so doing the city of Niles has been made to prosper by reason of having assets outside its corporate boundaries from which it has greatly profited. The same can be said of the city of Youngstown, in an equal degree.

Without going into the many ramifications indulged in by the court in seeking a solution to this problem, which is altogether a question of fact, no question of law being involved, this court has reached the conclusion that the burden placed upon the city of Niles should be modified in some respects, to the end that the outside territory benefited should indirectly at least be caused to pay some of the cost of the improvement occasioned by Amendment No. 1. The court has carefully considered the questions of relative tax values, population and water consumption, together with the respective sales of water outside the district by each municipality and has arrived at the conclusion that 36% of the bond issue should be allocated and charged against the real estate tax valuation, as shown by the latest appraisal of the cities; and by the term "latest appraisal" we mean the appraisals made the same year in the two cities; and 64 percent of the cost should be borne by the municipalities on the water consumption basis, or rather the purchase of water by each municipality. This gives rise to the following formula:

On 36 — 64 Basis

City	From Tax Duplicates 36% of Total	From Consumption 64% of Total	Total Benefit Percentage
Youngstown	91.9%=33.084%	76.2%=48.768%	81.852
Niles	8.1%= 2.916%	23.8%=15.232%	18.148
	36.000%	64.000%	100.000

Now as to the tax valuations, I think perhaps I covered that. I understand the valuations were considered by the appraisers on the basis of the valuation for the year 1949.

Of course, the same formula as given here should be followed, and the valuations should be taken, as of the same year, the latest of which should be used as the available formula.

In arriving at this conclusion the court has examined and considered almost every available formula that could be devised. Inasmuch as tax values and populations are keeping pace one with the other, we have not seen fit to allocate any part of this cost on the basis of population, because if that were done there could be no change in the allocation except by the use of an official census. It therefore abandoned the population test and used the formula heretofore given, that is to say, tax valuation and water consumption.

It is the further order that a recast of the assessment be made every year under the same formula taking into consideration the amount of water consumed during the preceding two years, and tax valuation based on each reappraisal of the same years as approved by the state tax commission. In that way, and in that way only, can we guard against inequalities that might arise by the use or the failure to use water as the same may be brought about by changed conditions or otherwise.

In conclusion, we wish to observe that we believe that under ordinary circumstances the consumption of water should be taken as the basis for the allocation of cost in so far as the law permits, but we further believe that the peculiar situation that confronts this sanitary district will show that the allocation as made by the court guards against inequality and will prove satisfactory to all parties concerned. The report of the board of appraisers is approved and confirmed, except as heretofore stated; and the board of appraisers are hereby ordered to recast the roll in accordance with and in conformity to the precise changes as herein specified, and report to this court as to such changes.

An entry may be drawn by counsel for the appraisers, that is Judge Barnum, and submitted to all other counsel for approval, and to the court, which entry will embody and dispose of all of the issues in this case which have been enumerated by the court; and as to any issues not mentioned by the court, the entry will dispose of such matters in conformity to the report of the board of appraisers.

I may have omitted something; if I have, I will ask each of the other judges, or give each of the judges an opportunity to say what they think about.

Birrell, J., and Maiden, J., concur.

Judge Maiden:

I concur in Judge Belt's opinion in toto, both as to conclusions, and as to reasoning.

Now, perhaps something should be said about the language in 6602-64, wherein the word "roll" is used, and recast the "roll". The first sentence of 6602-62 says that "The board of appraisers shall prepare a report of its findings, which—"—I am omitting some words not material here—"—shall be known as the sanitary district appraisal record."

Now, we go to the third sentence from the end of subsection 64, and it reads like this: "The court may, if it deem necessary, return the report to the board of appraisers for their further consideration and amendment, and enter its order to that effect." That word "report", by reference to sub-section 62 means the sanitary district's appraisal record, because the statute so says.

Now, reading the next to the last sentence of sub-section 64, "If, however, the appraisal roll as a whole is referred back to the appraisers, the court shall not resume the hearing thereof without new notice, as for an original hearing thereon." Now, the sentence uses the words "appraisal

roll." That can mean nothing further than the "report" above mentioned, and the appraisal record mentioned in the sub-section 62.

Reading the last sentence of sub-section 64, "But the court may, without losing jurisdiction over the roll—"—interpolating, that means the appraisal roll as mentioned in the preceding sentence. Reading further: "—order the appraisers to recast the roll",—that is, the appraisal roll, or, following the thought back further, the appraisal record. Reading on further: "—when the order of the court specifies the precise character of the changes thereof", and in that instance the court does not lose jurisdiction over the appraisal record or the report of the board of appraisers.

Now, by reference to Webster's Dictionary, I wanted to know what the word "roll" means. The definition is this: "That which is rolled up. Specif: A document on material such as parchment which may be rolled up; a scroll. Hence, an official or public document, as the engrossed record of the proceedings of a public body, as of a court, or of Parliament: a record."

Now, by reference to the Conservancy Act, 6828, sub-sections 30 and 32, we find substantially the same procedure outlined there as in the Sanitary Act; and in the Conservancy Act the wording speaks of the "appraisal record", and the appraisers may be ordered to "recast the appraisal record" when the order of the court specifies the precise character of the changes thereof.

A reference to those similar sections in the Conservancy Act leads to the conclusion that when the sub-section 64 says "that the court may, without losing jurisdiction over the roll, order the appraisers to recast the roll", it means appraisers to be ordered to recalculate and compute over

again the appraisal record which is mentioned above and in the preceding Section 62.

The Oxford English Dictionary defining "recast" is as follows: "To compute over again, to recalculate." So I thought that this explanation should be made of the meaning of those words, because evidently the Act, or someone working with the Act, before it became law, used the old common law phrase "recast the roll", and that has the meaning which has been given to it in the court's opinion here.

Judge Belt:

That is the usual practice in all conservancy courts; I happen to know that. If a court desires to set out specific changes, the appraisers simply make those changes and return the roll, and that is the order in this case.

Judge Birrell, have you anything to say?

Judge Birrell:

I concur in the decision as announced by Judge Belt. I have no matters to mention except two, and those two I feel as if should be mentioned because this district is going to continue for many years, and possibly the court of jurisdiction will continue for some little time, and sometime in the future they will look back to the decision that has been made by this court at this time as precedent for future decisions in similar matters.

The two things that I wish to mention are these: In the first place, while I concur in the opinion of Judge Belt with reference to the taking into the district of outside territory, it seems to me that, under the statutes, there is the possibility of appraising benefits upon property which have been benefited by the improvement even though that property is already outside the district, and even though

that property may not be taken into the district. It is unnecessary for me to discuss the law on that matter.

I concur in the report of the board of appraisers for the reason that under all of the matters which were considered by the board of appraisers, and which were considered and discussed by the original board of appraisers in 1928, I can see that there is a great possibility that it is wiser, perhaps, to carry on this district by considering solely the cities of Youngstown and Niles as parts of the district. And under that view, I would not say—I wouldn't set myself up as saying—that the board of appraisers are in absolute error in determining the method of appraising the benefits. However, I think that this district is not owned by either the city of Youngstown, or the city of Niles; the district is an area which is greater than those two cities, and of which those two cities merely are a part.

As the use of water grows in general—I am going to use this term "metropolitan area", which this district serves—the question is going to arise in the future, as it has already arisen at the present time, of whether the outside areas should be used by the cities as a method of selling surplus water, and thus making money for the cities. It seems to me that it would be better, rather than meeting the problem as the appraisers have met it at this time, and as future directors and boards of appraisers and courts of jurisdiction will be required to meet it when it becomes necessary again to enlarge the district by Amendment Number 2 and 3, and so forth, and thus run up against this question of how are they going to divide the cost of the improvement between the two member cities, it would be better at this time to assess the added benefits, not only against the two cities, but against the territory outside of the member cities in some certain proportion as that territory accepts the benefit of the water which is produced by this district.

The second thing that I wish to speak about is the division of benefits between the member cities, or rather the division of the costs between the member cities. I concur in the decision for this reason: According to the statutes, the board of appraisers merely divided the benefits between the two cities, and the board of appraisers have the right to consider the elements which they used in determining division of this benefit. They are now using the element of consumption as one of the elements which should be considered. The element of consumption was considered by the original board of appraisers. The original board of appraisers, in 1928, following the recommendation of the engineer of the district, as is shown by a copy of his recommendation in one of the exhibits, found that there were three elements at that time which should be considered in determining the method of division. Those three elements were population, tax valuation and consumption. At that time, the board of appraisers came to the conclusion that the consumption of water was paid for by the cities in accordance with the amount that they used, and that was allocated entirely to the maintenance fund; therefore, they left that out of their consideration when it came to dividing the benefits between the cities for the payment of the fund for construction of the district, and, therefore, they only considered population and tax valuation.

Now, very possibly the present board of appraisers have determined to consider only tax valuation and consumption, and it is very possible for them to consider consumption as more important than tax valuation. As long, however, as the statutes do not permit the expense of enlarging the territory and the cost of enlarging the plant, when that cost is over ten per cent, to be assessed by water consumption, it seems to me that it would be very proper for this

district, or this area which is affected by that matter, to secure an amendment to the statutes governing the affairs of water districts to secure an amendment of those statutes to permit the district itself to issue its bonds and pay for them out of its charges for the sale of water, rather than by assessment upon the lands or member cities of the district.

Mr. Hunt: If Your Honors please, I understand the court to state that this formula was to be applied yearly, that is, it was to be recomputed yearly. I didn't understand you to indicate whether that was to be on the previous consumption, for instance, previous—

Judge Belt: Previous two years.

I think you will get a copy of this opinion. I think every counsel should have a copy of the opinion of the court.

Judge Barnum: If the court please, I have listened with a great deal of care and attention to your opinion, and the remarks of your concurring members.

You have put the burden upon me to draft a journal entry, and I would like to make an inquiry as to that journal entry. As I look at your opinion, and your idea, you do not wish to enter any final judgment on any phase of it as of this time; all that you want the journal entry to include is a directive to the board of appraisers to recast, make the amendment that you suggested, and report back and that you will reserve your final judgment, order and decree, upon all of these questions when you hear the amendment, or the recast of the roll.

Judge Belt: That is true. My notion is that if the directive is followed by the board of appraisers, and sent back to the court, of course, that court will approve it; otherwise, it might order some further change, but I am sure when you examine the opinion you will follow the directive of the court. There is really only one. The court

approves the report of the board of appraisers in every respect, except as to the allocation as between Youngstown and Niles.

Judge Maiden: Judge Barnum, I don't know whether Judge Belt got what your inqury was. Judge Barnum wanted to know whether you wanted a complete journal entry journalized, based upon this opinion now, or whether the journal entry to go on would merely be referring back to the board for action in accordance with the opinion, and the complete journal entry go on after the board returned the report to the court. That, as I understand it, is his inquiry.

Judge Belt: I think a journal entry should go on now, directing the board to make the changes in the respects indicated. Of course, that is not the final journal entry. If the final journal entry will be approved by the court after the changes have been made, and the whole matter submitted to the court, if correctly made, the court will approve, otherwise not.

Judge Barnum: While I am on my feet, and I think I am speaking on behalf of all counsel and all parties interested in this case, I want to thank all three members of the court, and I want to especially thank Judge Belt for his care, his attention and time that he has put in on this matter, and especially his patience. You will be remembered by all of us as one having a marked degree of patience, as well as a marked degree of ability. I want to thank you very kindly.

Judge Belt: Really, Judge Barnum, I have enjoyed it. Thank you.

Mr. Hunt: For the purpose of the record, Your Honors, may we have our exceptions noted?

Judge Belt: Exceptions may be, of course, filed by all parties upon the presentation of the entry, and its approval.

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 224.

CITY OF NILES, OHIO,

Petitioner,

v.

THE MAHONING VALLEY SANITARY DISTRICT,

Respondent.

BRIEF OF THE MAHONING VALLEY SANITARY DISTRICT OPPOSING CERTIORARI.

ESSENCE OF THE DISTRICT'S RESPONSE.

The respondent, The Mahoning Valley Sanitary District, maintains that the record does not justify consideration of the merits of the federal questions which the petitioner purports to present; and that the Supreme Court of Ohio did not decide the appeal to it in a way contrary to applicable decisions of this Court. Only a question of Ohio state court procedure, based upon Ohio statutes, was decided by the Supreme Court of Ohio. The claim that such statutes grant unjustifiable unilateral rights of appeal is not now presentable.

Proper analysis of the record will furnish a basis only for a single question, if any, i.e., as to whether the Constitution of the United States guarantees that litigants in state courts shall have rights of appeal after trials in courts of original jurisdiction. This Court has many times answered in the negative. Even this question is not reached in this case because the petitioner is a political creature of the state.

MAJOR PROCEDURAL FACTS.

Respondent, The Mahoning Valley Sanitary District, was formed in 1926 under the Sanitary District Act of Ohio (108 Ohio Laws 634; Ohio Revised Code, Sections 6115.01 to 6115.99) and thereupon became "a political subdivision and public corporation of the state." (Ohio R. C. 6115.03F and 6115.08.) It has been supplying water to the two cities comprising the district, the City of Youngstown in Mahoning County and the City of Niles in Trumbull County, and they, in turn, have sold surplus water to areas located outside the district. The constitutionality of the Act was, in 1929, upheld generally notwithstanding claims of violation of due process and equal protection as guaranteed by the federal constitution. *Shook v. Mahoning Valley Sanitary District,* 120 Oh. St. 449. Appeal to this Court was dismissed by appellant, 281 U. S. 770.

A special court of common pleas organized in accordance with the Sanitary District Act by including one judge from Mahoning County and another from Trumbull County, on May 10, 1950 approved a plan denominated "Amendment No. 1 of the Official Plan of The Mahoning Valley Sanitary District." The amendment is designed to augment the supply of water at an estimated cost of $6,000,000. A board of three appraisers was thereupon appointed as required by Ohio R. C. 6115.29 for the purpose of valuing the property needed for rights of way and appraising benefits and damages that would accrue.

The petitioner objected to the appraisers' report as to benefits, which under Ohio R. C. 6115.48 becomes the basis for apportionment of assessments to finance the cost of such a project, on the ground that it unjustly favored the City of Youngstown and failed to assess any benefits

against property outside the territorial limits of the original district. The objections did not claim any deprivation of rights based upon the Constitution of the United States (Record, pp. 10-17).

To resolve a difference of opinion between the two judges of the special court in regard to the first report of the appraisers, the Chief Justice of the Supreme Court of Ohio added a judge of the Court of Common Pleas of Belmont County to the panel of the special court. After hearings about which there is no complaint, the disinterested judge, Judge Belt, from Belmont County, stated:

> "The board of appraisers did not include or appraise any outside territory, which failure upon the part of the board of appraisers, raises an inference at least that no outside lands were benefited. The conclusion of the court is that it is useless to do a vain thing. The court believes that under the situation presented, it would be folly to attempt to take in outside territory." (Petition, p. 32.)
>
> "* * * the court has considered the quantity of water sold by the City of Niles to corporations and individuals outside of its corporate boundaries. The court desires to commend the City of Niles for its activities in that respect. In so doing the City of Niles has been made to prosper by reason of having assets outside its corporate boundaries from which it has greatly profited. The same can be said of the City of Youngstown, in an equal degree." (Petition, p. 33.)

Another of the judges expressed the same view (Petition, p. 39), and the third concurred "in toto." (Petition, p. 36.) The court did favor shifting a larger share of the cost to Youngstown and this was done by recasting the roll before approval by the final entry.

Accordingly, the special court, all three judges concurring, on March 19, 1953, approved an amended report

of the appraisers by a journal entry quoted in the record at pages 33 to 40. Up to that time the only item in the record made by the petitioner with respect to the Constitution of the United States was a general statement directed to an intermediate order which the special court did later set aside that "(8) The said order, judgment and decree of the court of jurisdiction contravenes the Constitution of the state of Ohio and the Constitution of the United States of America." (Record, p. 19.)

Appeals by several exceptors including the petitioner herein were docketed in the Court of Appeals for Mahoning County but they were, on July 27, 1953, dismissed by that Court (Record, p. 43), pursuant to a *per curiam* opinion in which the three judges concurred, saying—

> "Thus the legislature has specifically prescribed that the decree of the court is final and incontestable except from an award for compensation or damages. The jurisdictional court has made no award for compensation or damages to any of the appellants, and it follows that there is no right of appeal in these cases now before us, and such appeals, being numbered 3593, 3594, 3595, 3596 and 3597, are hereby dismissed." (Record, p. 49.)

In the Court of Appeals, petitioner's only references to the Constitution of the United States were in the same general language quoted in the preceding paragraph hereof. (Record, pp. 46 and 47.)

Then the exceptors appealed to the Supreme Court of Ohio on a claim to an appeal as matter of right and also on condition that motions to certify the record be allowed, again repeating their general reference to the constitution of the state and nation. (Record, pp. 54 and 56.)

All that was said in the petitioner's brief with respect to the federal constitution is quoted in the footnote below.* The appeals as of right were "dismissed for the reason no debatable constitutional question is involved in said cause." (Record, p. 71.) But the motions to certify the record were allowed, and after hearing, the opinion by Judge Stewart begins by saying—

> "The sole question of law presented in the present cases is whether the Court of Appeals was in error in dismissing the appeals of appellants from the judgment of the court of the sanitary district, which judgment overruled the exceptions of appellants to the appraisal of benefits in connection with the expansion program of the sanitary district and confirmed such appraisal." (Record, p. 60.)

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* "It is further submitted that the order and decree of the Court violates the *Fourteenth Amendment of the United States Constitution* in that the taxpayers of Niles are denied equal protection of the law and are assessed a sum far in excess of the taxpayers of Youngstown on the basis of tax valuation. Further, said section of the *Fourteenth Amendment* is violated in that the outside areas receiving water from the proposed improvement have neither been appraised or assessed for those benefits." (Niles' brief, p. 21.)

"This Appellant respectfully submits that the order of the Court of Appeals denying Appellant its right of appeal, together with the order of the special Court of Jurisdiction as to the method of assessment, formula, the failure to assess outside areas are contrary to the *Constitution of the State of Ohio* and the *Constitution of the United States of America*, and if the Supreme Court of the State of Ohio should find that the Sanitary District Act permits the assessment and appraisal of benefits as ordered by the Lower Courts, then the said Sanitary District Act is unconstitutional because it violates *Article XII, Section II*, of the *Constitution of the State of Ohio*, and the *Fourteenth Amendment of the Constitution of the United States*, and for these reasons this appeal is on questions of law not only on condition that a Motion to Certify be allowed, but also because a debatable Constitutional question is presented." (Niles' brief, pp. 23-24.)

The points decided by the Supreme Court of Ohio were, to quote from its syllabus*—

> "4. Section 6602-65, General Code (Section 6115.36, Revised Code), provides that approval by a sanitary district court of the provisions of a report of a board of appraisers of a sanitary district, as modified and amended, makes the findings and appraisals comprising such report final and incontestable, and Section 6602-66, General Code (Section 6115.37, Revised Code), prohibits an appeal from any part of the decree of such court except an appeal for a jury trial from an award of compensation or damages, or both." (Record, p. 57.)

Nevertheless, the petitioner grasped at expressions in Judge Stewart's opinion (Record, p. 66) which refer to a provision that had been in the Sanitary District Act from its beginning, Ohio R. C. 6115.41 and its antecedents, and asked the Supreme Court of Ohio for a rehearing on assertion of there being unconstitutional variances in rights to appeal. The application was promptly denied without opinion. (Record, p. 72.)

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* In 11 *Ohio Jurisprudence,* Courts, Section 144, at pages 796-797, it is said:

> "This rule was adopted in January, 1858, and establishes the rule in Ohio that the syllabus of a supreme court decision states the law. Or, as differently expressed, *the points decided are found in the syllabus. Matter outside the syllabus is not regarded as decision.* * * * Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." (Emphasis ours.)

This text is supported by Supreme Court of Ohio case-law cited in the footnotes and was recognized in *Perkins v. Benguet Mining Co.,* 342 U. S. 437, 441-442.

FURTHER REVIEW IS, RESPONDENT SUBMITS, NOT JUSTIFIED.

1. Petitioner, Being a Subordinate Political Subdivision of Ohio, is Not Entitled to Contend That Ohio Statutes Violate Federal Rights.

Petitioner overlooks the fact that the Fourteenth Amendment affords no protection from state action to political subdivisions of the state. This rule of law forecloses consideration of any of the federal questions raised by this petitioner.

In *Williams v. Mayor and City Council of Baltimore*, 289 U. S. 36, a municipality contended that a state statute exempting a railroad from property taxes denied it the equal protection of the laws. This Court rejected that contention, stating:

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (p. 40)

No distinction is drawn between rights claimed by the municipality in its proprietary capacity or in its governmental capacity. *Trenton v. New Jersey*, 262 U. S. 182, 188-192; *Newark v. New Jersey*, 262 U. S. 192.

2. Petitioner Did Not Properly and Timely Raise Any Federal Question.

At each of the three stages in this litigation where petitioner asserts that it raised federal questions (Motion for New Trial, para. 8, Record, p. 19; Assignments of Error to Court of Appeals, para. 5, Record pp. 46 and 47; Assignments of Error to Supreme Court of Ohio, para.

VI, Record pp. 54 and 56) petitioner merely assigned as error—

> "* * * that the said order and decree of the court of jurisdiction contravenes the Constitution of the state of Ohio and the Constitution of the United States of America."

In *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248, this Court said:

> "Now, the only possible support to the claim that a Federal question on the subject under consideration was raised below, was the general statement in the answer to which we have already adverted, that, 'this proceeding is in violation of the Constitution of the United States.' Nowhere does it appear that at any time was any specification made as to the particular clause of the Constitution relied upon to establish that the granting of relief by *quo warranto* would be repugnant to that Constitution, nor is there anything in the record which would give rise even to a remote inference that the mind of the state court was directed to or considered this question." (p. 248.)

Petitioner's brief on the merits in the Supreme Court of Ohio is not a part of the record here and cannot be relied upon to fill this requirement. *Live Oak etc. Ass'n. v. Railroad Commission*, 269 U. S. 354, 357-359.

The petitioner's points in the Supreme Court of Ohio with respect to rights of appeal included the bald assertion, quoted *supra*, p. 5, that right of appeal is guaranteed by the Fourteenth Amendment. This contention seems to be abandoned here, as well it should be. In *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, the opinion of the court, per Mr. Chief Justice Hughes, states:

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently deter-

mined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." (p. 80) * * *

"It has been held by this Court that the equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a State as to subject matter or finality of decision if all persons within the territorial limits of the respective jurisdictions of the state courts have an equal right *in like cases under like circumstances* to resort to them for redress." (Emphasis ours; p. 81.)

Petitioner admits (page 6) that it raised the constitutional question as to "unilateral appeal" for the first time in its application for rehearing before the Supreme Court of Ohio after the judgment of the Court of Appeals had been affirmed. It is the settled rule of this Court that federal questions presented for the first time in an application for rehearing before the highest court of the state in which a decision could be had are not timely raised unless the state court actually entertains the petition and expressly passes upon the federal question or unless the question could not have been anticipated. In *Herndon v. Georgia,* 295 U. S. 441, 443, this Court said:

"The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (p. 443.)

While petitioner contends that this question first resulted because of the decision of the Ohio Supreme Court, it is clear that this is not so. Considering the syllabus, the

court decided only that the exceptors had no right of appeal on the subject matter presented. The question as to whether a board of directors of a sanitary district has any unilateral right to appeal was as inherent in the case at its inception as it is today. The original Sanitary District Act, 108 Ohio Laws, p. 654, Section 37 (as R. C. 6115.41 now does), granted *capacity* to such boards to appeal from orders of courts of common pleas, but in other sections the Act limits *subject matters* that are reviewable and regulates channels of appeal. If there were any constitutional question involved here it would arise from the language of the statute and not from the decision of the Ohio Supreme Court. There being no excuse for petitioner's failure to raise this federal question in a timely manner, this Court cannot be expected to consider it. *American Surety Co. v. Baldwin,* 287 U. S. 156, 163-164.

3. Ohio Supreme Court Did Not Hold That Sanitary Districts Have Unilateral Right of Appeal and Review by This Court Now Would be Premature.

Since "the points decided are found in the syllabus" (*supra,* p. 6), obviously the Supreme Court of Ohio decided that the petitioner did not have a right of appeal on the subject matter presented and did not decide that respondent had a right of appeal on such subject matter. The District had not appealed from the decree of the special sanitary district court. No question concerning its rights of appeal had been presented for decision. The opinions of this Court have stated:

> "We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so." *Adler v. Board of Education,* 342 U. S. 485, 496.

There is no reason to suppose that if the question ever is presented, the Supreme Court of Ohio will hold that the District has a right of appeal on subject matter as to which duly interested opposed parties cannot appeal; and, *a fortiori*, no reason to suppose that it will construe the Act as authorizing any unjustifiable classifications of procedural rights and thereby raise constitutional questions. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546; *Dohany v. Rogers*, 281 U. S. 362, 368-369; *Asbury Hospital v. Cass County*, 326 U. S. 207, 214-215.

If any occasion arises for the Supreme Court of Ohio to consider the appellate rights of a sanitary district, it would be *stare decisis* that parties in the position of the petitioners cannot, under the current Act, appeal from the special sanitary district court directly to a state court of appeals on subject matter like that covered by the appeal in this case. At the present time the question is moot; the petitioner would not gain a right of appeal contrary to express provisions of the Act by convincing the courts that some one else also should not have appellate rights. In *Massachusetts v. Mellon*, 262 U. S. 447, the opinion of the court states:

> "The party who invokes the power (of the courts to disregard an unconstitutional enactment) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (p. 488, matter in parentheses is ours for context.)

Judge Stewart's dicta, rightly read, do not express an opinion that sanitary districts can appeal directly to a Court of Appeals from any portion of a special court's decree approving a report by a board of appraisers. The

appellants, including petitioner, had contended that Ohio G. C. 6602-68 (R. C. 6115.39) authorized their appeal to a Court of Appeals notwithstanding the limitations, prohibitions and regulations of G. C. 6602-65 and 6602-66 (R. C. 6115.36 and 6115.37). The last paragraph of Judge Stewart's opinion (Record, p. 66) expresses his view that a special district court's decree approving the report is "final and incontestable except as to an award of compensation or damages." The appeal on these matters is to a court of common pleas for a jury trial whereas districts are, by G. C. 6602-70 (R. C. 6115.41), granted capacity to appeal from orders of common pleas courts pursuant to *any section of the entire Act "not requiring* the intervention of a jury." There are many potential situations not dependent upon decrees approving appraisers' reports from which boards might want to appeal. They might want to appeal from the judgments *following* the jury trials authorized by G. C. 6602-66 (R. C. 6115.37). The General Assembly of Ohio was disposed to grant the necessary capacity.

Several times, we have emphasized the distinction between the grant of *capacity* to appeal and authority to carry up particular *subject matters.* If it were not for the grant in G. C. 6602-70 (R. C. 6115.41) to districts of capacity to appeal, it might have been arguable that districts did not have a right to appeal any subject matter at any time. Note petitioner's argument and conclusion, its petition pages 7 and 13, and the principle that "Unless there is express statutory authority therefor, an agency may not appeal from a judgment which, in effect, vacates its decision." *Miller v. B. U. C.,* 160 Oh. St. 561, 563; and *Corn v. Board,* 160 Oh. St. 9 at p. 19.

Decrees of special sanitary district courts approving reports by boards of appraisers are, of course, within the

generality of "any order" under the Act, but the prohibitions upon which Judge Stewart and the Ohio Supreme Court relied were in relation to particular subject matters and would prevail over the general capacity with which the districts are endowed. As Mr. Justice Holmes stated in *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379:

> "The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." (p. 383.)

4. Petitioner's Questions "2" and "3" Did Not Reach the Supreme Court of Ohio In Form For Review By This Court.

The petition asserts "that properties outside of said cities will benefit from said improvement but have not been assessed therefor" (question "2," p. 2), and that the appraisers' report and special court's decree unduly favored the City of Youngstown (question "3"). (Petition, pp. 9-12.) There is no claim of fraud or lack of hearings.

The facts expressed in these conclusions, the petitioner asserts, deprived it of property without due process of law and deprived it of equal protection of the law. The petitioner does not contend that the Sanitary District Act is deficient but only that the appraisers and special court did not follow the petitioner's interpretation of the Act and thereby erred with resulting violation of federal rights.

Since the Court of Appeals dismissed petitioner's appeals for want of appealable subject matter, and the propriety thereof has been affirmed by the Supreme Court of Ohio, the opinion and judgment of the special sanitary district court has stood for more than ninety days, for

more than sixteen months, without any petition to this court on federal grounds and even now the petition seeks a writ directed to the Supreme Court of Ohio. It would, therefore, be too late and out-of-place to issue a writ to the special sanitary district court on these assigned grounds. (28 U. S. C. § 1257 and § 2101c; *Ohio ex rel. Bryant v. Park District, supra,* 281 U. S. 74, 80-81.)

The merits or lack of merit in these points of the petitioner is immaterial because if the petitioner had no right of appeal, the order of the special court on March 19, 1953 is too venerable for review, and if the petitioner did have a right of appeal within the Ohio hierarchy of courts by virtue of *United States* law, then these points would have first to be considered by the Ohio appellate courts. When similar questions were tendered in respect to the decision in *Beck v. Drainage District,* 8th C. C. A., 46 F. 2d 632 (annotated in 84 *A. L. R.*, pp. 1098-1110) this Court denied certiorari, 284 U. S. 618.

CONCLUSION.

The state of Ohio, to use language of Mr. Justice Cardozo in the opinion of the court in *Snyder v. Massachusetts,* 291 U. S. 97, 105,

> "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (p. 105.)

No such federal question of substance is presented by the record herein. Right of appeal is not guaranteed by the Constitution of the United States. State grounds, legitimate construction of an Ohio statute, are broad enough to sustain the decision.

Whether the respondent has any unilateral rights of appeal and if so, whether the classification is unjustifiable are moot questions which were not raised timely and which this Court need not resolve until presented by a party who would be affected by the answer.

Time for review of the decree of the special sanitary district court in respect to petitioner's points "2" and "3" elapsed long ago and is not even sought now. Those matters were not considered by any other Ohio court.

It is respectfully submitted that the petition should be denied.

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